United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY and TONOPAH & GOLDFIELD RAILROAD COMPANY, a Corporation,
Plaintiffs in Error.

vs.

GOLDFIELD CONSOLIDATED MILLING & TRANSPORTATION COMPANY, a Corporation,
Defendant in Error.

No. 2467

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR

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STATEMENT OF CASE.

This suit was instituted by the Defendant in Error for the purpose of recovering the sum of Four Hundred and Forty-seven Dollars ($447.00) which represents the difference between the rates charged by plaintiffs in error and their eastern connections for transporting steel window sash from Youngstown, Ohio, to Goldfield, Nevada, and the rate which the Commission ordered the carriers to publish for performing the same service.

Complaint was originally filed before the Interstate Commerce Commission entitled "Goldfield Consolidated Milling & Transportation Company vs. Chicago & Erie Railroad Company, et al." and was numbered 5064.

This petition alleged that the rate which had been published by the carriers, $3.44 per hundred pounds, for transporting shipments of this commodity between the points specified was unreasonable and prayed that an order be entered that the rate of $1.95 was a reasonable rate and that the carriers be required to assess their charges on this basis.

The Commission, after hearing, rendered its decision holding that the rate complained of was unreasonable and entered an order requiring the carriers to publish the rate of $1.95 held by the Commission to be reasonable, and awarded reparation to the complainant in the amount specified.

Thereupon, the carriers filed with the Interstate Commerce Commission a petition for rehearing, which was subsequently denied, and, upon the denial of the petition for rehearing, the rate prescribed by the Commission was published as ordered.

Defendant in Error then filed this suit in the United States District Court, praying judgment for Four Hundred and Forty-seven Dollars ($447.00) together with interest at seven per cent. (7%) and for attorneys' fees in the sum of Two Hundred and Fifty Dollars ($250).

As is disclosed by the transcript of record, Defendant in Error offered in evidence the decision and order of the Commission and the Reporter's transcript of the testimony taken at the hearing before the Commission and certain exhibits offered at the hearing and rested its case upon this showing.

No evidence was introduced on behalf of the carriers.

SPECIFICATIONS OF ERROR RELIED UPON

There are eight specifications in the assignment of errors contained in the transcript of record, pages 72 to 74 inclusive, which briefly stated are:

(1) That the court erred in holding that the decision and order of the Commission were supported by the evidence introduced before the Commission and in holding that the decision and order were valid.

(2) That the court erred in overruling the demurrer interposed by Plaintiffs in Error.

(3) That the court erred in holding that Defendant in Error had proved that it had been injured and had sustained damage in the sum awarded by the Commission by way of reparation, and that the Commission's order of reparation was a prima facie showing sufficient to justify the court in finding that Defendant in Error was entitled to an award of damages.

THE LAW

Before arguing the specific legal propositions which will be directed to the court's attention, it may serve the convenience of the court to make a brief reference to the underlying and fundamental principles which govern in proceedings of this character.

JURISDICTION

It becomes important at the outset to correctly define the jurisdiction which may be exercised by the Interstate Commerce Commission and the jurisdiction which may be exercised by the courts. In other words, to draw a sharp line between the jurisdiction of the legislative and judicial tribunals. In this connection it is necessary to do no more than refer to the leading and recently decided case of Prentis, etc. v. Atl. Coast Line, 211 U. S. 210, 226, wherein the court holds that although a state Corporation Commission may exercise quasi judicial functions in the first instance in determining the reasonableness of a rate, that it is the final act taken by the Commission, the prescribing of a rate for the future, which gives character to the entire proceeding, and that the act of the Commission is purely legislative and not in any sense judicial.

The Supreme Court has further held that the jurisdiction of the courts cannot attach in cases such as this until the reasonableness of a rate has, in the first instance, been determined by the legis-

lative tribunal, the Interstate Commerce Commission.

Abilene Cotton Oil Case, 204 U. S. 426;
Robinson vs. B. & O. R. Co., 222 U. S. 506, 511.

A question is raised that the Commission has rendered a decision and order upon which a suit before the District Court of the United States was properly predicated so far as the jurisdictional question is concerned, and it, therefore, becomes important to determine how far the jurisdiction of the District Court extends.

The authorities are uniform in holding that where the validity of the Commission's decision and order is put in issue, as in the case at bar where the validity of the Commission's order is questioned in the special defense pleaded in the answer, it is the duty of the Federal courts to examine into this question upon a trial de novo in order to determine whether the Commission's order is (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. Questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; *or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or*

without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determine the validity of the exercise of the power.

I. C. C. v. Union Pacific RR. Co., 222 U. S., 541-546;
I. C. C. v. Ill. Cent. RR. Co., 215 U. S. 452-470;
S. P. Co. v. I. C. C., 219 U. S. 433;
I. C. C. v. Nor. Pac. Ry. Co., 216 U. S. 538-544;
I. C. C. v. Ala. Midland Ry. Co., 168 U. S. 144;
I. C. C. v. Louisville & Nashville RR. Co., 227 U. S. 88.

THE DECISION AND ORDER OF THE COMMISSION ARE NOT SUPPORTED BY THE EVIDENCE INTRODUCED AT THE HEARING AND THE ORDER IS THEREFORE VOID AND THE COURT WITHOUT JURISDICTION.

In determining the question of the validity of the order it should be kept in mind that the question presented is not whether the rate *prescribed by the Commission* is just and reasonable but whether the rate *fixed by the carriers* and of which complaint was made was unjust or unreasonable, for the reason that unless the rate fixed by the carrier was unjust or unreasonable,—and this fact was estab-

lished by the evidence at the hearing—the Commission never became vested with jurisdiction to prescribe the rate set forth in its order.

The carrier is the primary rate maker and unless the evidence introduced at the hearing warrants the conclusion *as a matter of law* that the rate fixed by the carrier is unjust and unreasonable in and of itself, having regard to the service rendered, the Commission has no authority to set it aside and fix a different rate.

There must be competent evidence before the Commission to show that the rate fixed by the carrier is unjust and unreasonable in the sense stated because the statute does not authorize the Commission to set aside a rate simply because, in *its* judgment, the carrier can afford to make a lower rate or because a lower rate is necessary to meet competition. These principles are fully supported by the decisions.

In I. C. C. vs. Louisville & Nashville RR. Co., 227 U. S. 88, 92, the Supreme Court, speaking by Mr. Justice Lamar, said:

> "*Under the statute the carrier retains the primary right to make rates*, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. *The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order.*

> Int. Com. Comm. v. Northern Pacific Ry., 216 U. S. 538, 544. In a case like the present the courts will not review the Commission's conclusions of fact (Int. Com. Comm. v. Delaware &c. Ry., 220 U. S. 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. *But the legal effect of evidence is a question of law.* A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551." (Italics ours.)

In Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433, the Supreme Court held:

> "The powers of the Interstate Commerce Commission do not extend to regulating and controlling the policy of the owners of railroads in fixing rates, and it cannot substitute for a just and reasonable rate, a lower rate, either on the ground of policy or on the ground that the railroad was by its former conduct estopped from charging a reasonable rate."

It is to be noted that in the last case cited the Supreme Court looked through the form of the Commission's finding to the substance of its decision. It must appear from the Commission's decision that the grounds upon which the Commission based its order were such as to justify a finding that the rate fixed by the carrier was, in itself, unjust and unreasonable. It is not a question as to which is the

more reasonable rate—the primary question is whether the carrier's rate was unreasonable and unjust in and of itself, having regard to the service rendered.

The burden of proving the unreasonableness of the rate, of which complaint is made in the proceedings before the Commission, rests on the complainant.

> Chicago Great Western Case, 209 U. S. 108;
> Illinois Central v. I. C. C., 206 U. S. 441, 464.

These authorities establish the proposition that, unless the complainant himself introduces substantial evidence to support the allegations of the petition, the complaint must be dismissed.

THE TRANSCRIPT OF EVIDENCE DISCLOSES THAT THERE WAS NO SUBSTANTIAL EVIDENCE INTRODUCED BY COMPLAINANT TO SUPPORT COMMISSION'S DECISION AND ORDER BUT THAT ON THE CONTRARY THE DECISION AND ORDER ARE AGAINST AND OPPOSED TO THE EVIDENCE.

The transcript introduced in evidence in the case at bar discloses that the routing of the shipment was shown by the introduction of bill of lading, that a statement was introduced showing the rates applying on Steel Window Sash from Chicago to Denver, Omaha to Denver, New Orleans to Denver, to Falls City, Nebraska, and according to the statement of

counsel for complainant "the purpose of this exhibit is to show that in the various territories the same rate is applied on Steel Window Sash as is applied to Wooden Sash, and that the rate on Wooden Sash from Sacramento to Goldfield is sixty-five cents (65c) as against the rate on Steel Window Sash of two dollars and fourteen cents ($2.14)." Other exhibits were introduced showing that the same rating is applied on Steel as Wooden Sash in Official Classification territory and that a commodity rate is applied on the Steel Sash the same as for Wooden Sash in Southern Classification territory and that the rates on Steel Window Sash in the different territories are graded on the same rate as Wooden Sash.

According to the statement of counsel for complainant, these exhibits were introduced to show that the rate on Wooden and Steel Sash was the same in other territories, from which the inference was drawn that the same rate should be applied on Steel as Wooden Sash on the shipment in question. This is all the evidence which was introduced by complainant and it is significant that, when complainant's counsel announced that they had nothing further to introduce, the Examiner who presided at the hearing asked "You have nothing to show the similarity of conditions?", to which counsel for complainant answered "except that and that the rate is unreasonable as compared with the rates for Wooden Sash between the same points." (Transcript, page 58)

Carriers' Evidence.

The carriers introduced evidence showing that the rates specified in complainant's exhibits had been forced down to lower than a normal basis because of competitive conditions and that the rates relied upon by complainant by way of comparison were, in fact, competitive rates and by comparison with normal rates were "exceptionally and unreasonably low" (Transcript, pages 58-59), and that, in fact, the rates in controversy were abnormally low and had been established upon this low basis because of competitive conditions and the expense of hauling the shipments over the territories was unusually heavy (Transcript, pages 60-61); that the Steel Window Sash is an entirely different character than the Wooden Sash; that the Wooden Sash moves in greater volume and that because of the dissimilarity of circumstances and conditions surrounding the haul of these commodities in Official and Southern Classification territory and Western Classification territory, the rates in the other territories did not furnish a proper basis of comparison. (Transcript, pages 60, 61)

Even though no consideration be given to the evidence introduced by the carriers, which stands uncontradicted, and reference be had only to the evidence introduced by complainant, it must appear that the decision and order are not supported by the evidence.

The authorities already cited are conclusive in showing that the court must determine *as a matter*

of law whether the evidence introduced before the Commission was sufficient. The insufficiency of this evidence is easily demonstrable by reliance upon the rules established by the Commission itself and which have been approved by the Federal courts. The rates in controversy are competitive rates and have been held to be such by the Commission itself,

> City of Spokane vs. Northern Pacific Ry. Co., 15 ICC 376; s. c. 19 ICC 162.

The rates in controversy are constructed by adding to the terminal rate, Youngstown to Sacramento, the proximate terminal,—a rate established as found by the Commission in the cases last cited to meet the competition of sea carriers and upon lower than a normal basis,—the rate from the proximate terminal, Sacramento, to Goldfield. This basis of rate-making has been expressly approved by the Supreme Court of the United States.

> I. C. C. vs. Louisville & N. Rd. Co., 190 U. S. 273.

It therefore appears that the shipment in question moved under a rate which had been established upon lower than a normal basis to meet competitive conditions. The Commission is without power to reduce such a rate except upon substantial evidence.

Further, according to the undisputed testimony, the Commission undertook to determine the reasonableness of these rates by comparing them with

rates which were competitive. Such comparisons cannot be made.

> Mayor of Wichita Case 9 ICC 555;
> Northwest Lumber Cases, 14 ICC 1, 14;
> Burnham-Hanna-Munger vs. CRI&P, 14 ICC 299, 310, affirmed by the Supreme Court of the United States 218 U. S. 88.

As has already been shown, the only evidence introduced by complainant before the Commission was tables of other rates in other territories which were intended to serve as bases of comparison. Such evidence cannot be considered substantial evidence as defined by the Supreme Court in the cases of Union Pacific Railroad Company v. I. C. C., 222, U. S. 541 and Louisville & Nashville v. I. C. C., 227 U. S. 88 for the reason that the Commission and the Supreme Court have held uniformly that before such rates may be used as a basis of comparison, it is incumbent upon the person making such comparisons to show the similarity or dissimilarity of circumstances and conditions surrounding the haul in the several territories.

> Smyth vs. Ames, 169 U. S. 466, 540.

The rule is well stated in the case of Railroad Commission of Montana v. Northern Pacific Railway Company, 26 ICC 407, 408:

> "There is no evidence submitted as to the similarity of transportation conditions or the volume of the traffic under the respective rates involved in these comparisons.
> * * * * * * *

> The party at whose instance a proceeding is brought should be represented by some one able to give full and specific information as to the nature and extent of its business and the specific commodity it handles. The Commission is not justified in condemning the rates under consideration upon the mere impressions and comparisons in this record. It may act in any case only upon facts and conditions duly established. And in its endeavor to ascertain these facts it should be aided in every possible way by the party on whose behalf complaint is filed who is presumably the most competent to render that aid, with respect, at least, to the character of the commodity in issue.
>
> If we should condemn the present rates upon this record we would in effect be acting upon no evidence or information except a comparison of rates pointed out from tariffs on file with this Commission by the Railroad Commission of Montana."

The rules which govern and bind the Commission in determining questions such as were submitted to them in the case at bar are well stated by Mr. Commissioner Harlan in the Memphis Cotton-Seed Oil Case, 17 ICC 313, 318. In the case at bar the Commission have violated all these principles of rate making and have done exactly what they say they should not do in the case of Montana Railroad Commission v. N. P. Ry. Co. supra. Their decision and order are not predicated upon any "substantial evidence" but, to the contrary, their decision and order are against the evidence and their order is

therefore void. As the entry of a valid and enforcible order by the Commission is a jurisdictional prerequisite to the institution of a proceeding such as this in the District Court and, no such order having been entered, the Court was without jurisdiction and judgment should have been entered for defendant. "A void judgment is, in legal effect, no judgment—by it no rights are directed and from it no rights can be obtained * * *" (Freeman on Judgments 4th Edition, Section 117.)

PLAINTIFF FAILED TO ALLEGE OR PROVE DAMAGE.

In the specification of errors it will be found that exception is taken to the order of the court overruling the demurrer and to the action of the court in finding that plaintiff had shown that he had suffered injury and had been damaged by relying upon the recitals in the Commission's order awarding reparation, and as the same legal principles are involved these questions may best be considered together.

No evidence at all was introduced by complainant to show that it had sustained injury or suffered damage but, as has been stated, plaintiff relied entirely upon the recitals in the Commission's decision and order, plaintiff having failed to allege that he sustained damage and having failed to prove that any damages were actually sustained at the trial in the District Court, but endeavors to rely

solely and entirely upon the recitals contained in the Commission's decision and order. These recitals are contained in the last paragraph of the decision:

> "We further find that complainant made the shipment in accordance with the above statement of facts and paid charges thereon at the rate herein found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount paid and the amount which it would have paid at a combination through rate of $1.95 per 100 pounds, made up of $1.30 to Sacramento, Cal. and 65 cents beyond, and that complainant is therefore entitled to an award of reparation against the Southern Pacific Company and Tonopah & Goldfield Railroad Company in the sum of $447, with interest from November 25, 1910."

The order itself reads as follows:

> "*And it is further ordered,* That said defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, authorized and directed to pay unto complainant, The Goldfield Consolidated Milling & Transportation Company, on or before July 1, 1913, the sum of $447, with interest thereon at the rate of 6 per cent. per annum from November 25, 1910, as reparation on account of a rate charged for the transportation of a carload of steel window sash and parts from Youngstown, Ohio, to Goldfield, Nevada, which rate so charged has been found to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

We make the unqualified statement that this is the only matter before the court with reference to the question of damages and that such proof is unsupported by any of the allegations of the complaint as is pointed out specifically by the demurrer which the court overruled, thereby committing reversible error.

> Davis v. Mobile & O. R. Co., 194 Fed. 374 (CCA 5th Circuit)

Wherein the court held, in a case precisely in point:

> "* * * But there is a significant absence of allegations showing that he (the plaintiff) paid the freight on the shipments or that it was paid by anyone for him and on his account. * * *"

And the court held that the shipper having failed to allege that he paid the freight on the shipment made by him, or that it was paid by anyone for him or on his account, the complaint was demurrable. Not only must these facts be alleged but they must be proved by competent evidence and the recitals in the Commission's decision and order cannot supply this omission.

This matter has been definitely determined by the Supreme Court of the United States in the case of Pennsylvania Railroad Co. v. International Coal Mining Company, 230 U. S. 184, 200, 204. The Court held:

> "On the civil side the Act provided for compensation—not punishment. Though the Act

has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Chicago & N. W. Ry., 167 U. S. 447, 460, construing this section (8) 'before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury'. * * *

The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and the amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record. * * *"

This suit arose out of the unlawful payment of rebates and the plaintiff sued to recover from the railroad similar amounts on shipments made by it; whereas, in the case at bar, the plaintiff sues to recover the difference between a rate established by the carrier and a rate prescribed by the Commission. The principle involved, however, is identical and has been so recognized by the Interstate Commerce Commission in the recent decision of New Orleans

Board of Trade v. I. C. RR Co., 29 ICC 32, where, in a proceeding similar to the case at bar instituted for the sole purpose of recovering reparation, the Commission predicated its opinion upon the case last cited. For convenience we quote from the Commission's opinion:

> "There is nothing in the act to regulate commerce from which a presumption of damage can be inferred and it has never been so held.
>
> The wording of the act is as follows:
>
> 'Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons *injured* thereby for the full amount of *damages sustained in consequence of any such violation* of the provisions of this act.'
>
> As said in Parsons v. C. & N. W. Ry. Co., 167 U. S., 447, 460, and quoted in Pa. R. R. Co. v. International Coal Co., 230 U. S., 200, in construing this section:
>
> 'Before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.'
>
> And in Pa. R. R. Co. v. International Coal Co., supra, it is said:
>
> 'Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what,

though called damages, would really be a penalty, in addition to the penalty payable to the government.'

Proof of the damages resulting from the wrongful act of the carrier must be by such evidentiary facts as would be required to sustain such a recovery before a court of law. Anadarko Cotton Oil Co. v. A., T. & S. F. Ry. Co., 20 I. C. C. 51.

Mere proof of specific shipments made and the freight paid and the amount for which reparation is sought does not make out a prima facie case. Something more is necessary. The complainant must show how the discrimination found to exist affected him to his damage. In other words, he must establish the *fact* of his damage as well as the *amount* of damages he claims."

This question, however, has been set definitely at rest by a decision rendered by the Circuit Court of Appeals for the Third Circuit in the case of Lehigh Valley R. Co. v. Clark, 207 Fed. 717. This case is precisely identical with the case at bar. In the Lehigh Valley case the Commission made a finding and ordered the railroads to make reparation, specifying the amount to be refunded in each case, and a certified copy of the report, conclusions and order of the Commission were attached as an exhibit to the complaint filed by the plaintiffs in the District Court and introduced in evidence. The plaintiffs in the Lehigh case adopted the same course as adopted by the plaintiff in the case at bar and relied upon the recitals in the Commission's decision and order

and offered no evidence to show that they had been injured or had suffered damages. Plaintiffs in that case likewise as plaintiff in the case at bar argued that the recitals made in the decision and order of the Commission made a prima facie case in support of their claim for damages, but the Circuit Court of Appeals very properly made the distinction between the weight and effect of the Commission's orders in cases where they had prescribed rates for the future and cases in which they had ordered the railroads to make reparation to the complainants. It is clearly pointed out by the court at page 721 that:

> "It is as though Congress had enjoined as a duty the things embraced in such lawful order. It is in this view of a non-reparation case that the finding by the Commission of the reasonableness or unreasonableness of a rate is a finding of an ultimate fact, which will not be disturbed by a court of equity unless the legality of the proceeding in which it is made is successfully attacked."

But the court points out that:

> "In such cases, the judicial power of a court of equity is invoked, to enforce, the *lawful* order of the Commission, and involves no controversy requiring a trial by jury. It is the *lawful* order, *qua* order, of the Commission, as an administrative body, that is to be enforced; whereas, in reparation cases, there is a controversy at common law as to whether the damages awarded by the Commission or any damages are recoverable, and the mere order of the

> Commission, as we shall see, only figures in the case as a necessary condition precedent to the bringing of the action, though the findings of facts by the Commission, as set forth in its report, are prima facie evidence of the matters therein stated. The damages sought are only recoverable by the verdict of a jury and judgment thereon, as in ordinary trials at common law."

The court then goes on to show that by the Hepburn Amendment of 1906, the Commission is not required to make specific findings of fact in *non-reparation cases*, but that the Commission is bound to make findings of fact in reparation cases. The court also points out that a marked distinction is made between reparation and non-reparation cases by the provisions of Section 16. The court quotes from the Louisville & Nashville Case supra, where the Supreme Court held that in non-reparation cases the courts will not review the Commission's conclusions of fact, etc. in cases where a *court of equity* is asked to enjoin the enforcement of such an order except as to determine whether the Commission acted within its power, etc., and the Circuit Court of Appeals then adds:

> "But it is clear that, *in a reparation case*, (italics ours) though the award of damages by the Commission, following its finding of fact that a given rate was unreasonable, may be proved as the basis or condition precedent to the institution of the suit for damages authorized by the statute, it is not capable of enforce-

ment as an administrative order, and is not of itself evidence of *liability*, *prima facie* or otherwise, in any judicial proceeding.

* * * * * * *

It hardly needs that attention be called to what is so obvious, that both the 'findings and order' are prima facie evidence only of the *facts* therein stated. This is very far indeed from declaring that the order itself, awarding reparation, is *prima facie* evidence of damages, or the proper measure thereof.

* * * * * * *

It makes redress of a private injury actually suffered, possible. It concerns the past and not the future conduct of the carrier, and, though this right of action for damages is qualified by making it depend in certain cases upon the precedent award of reparation by the Commission, such award is not of the nature of the administrative functions conferred on that body."

The court then establishes the legal principles, page 724, that a suit by one in whose favor Commission has made an award of damages by way of reparation is not a suit on the award but a plenary suit for damages actually incurred by the plaintiff, by reason of the violation of the act by the defendant as conclusively found by the Commission; that in the prosecution of such a suit plaintiff may avail himself, without further proof, of the conclusive *administrative* finding or order of the Commission that the defendant was guilty of a violation of the act "*but must prove the actual damages incurred by*

him by reason of such violation and for which damages alone the Act makes the defendant carrier liable."

It should be kept in mind that there was a specific order entered by the Commission predicated upon a finding that the plaintiffs were entitled to reparation on all shipments not barred by the statute of limitations, but the court held that: "Though these facts be taken by the jury as prima facie true, they clearly have no relevancy to the demand of the plaintiffs for damages. * * * It does not at all follow, as plaintiffs seem to be under the impression that it does, that because the Act makes certain findings of fact prima facie evidence of such facts, it also determines their probative force" and that "It is only as to the *facts* contained in the order, that the order is made prima facie evidence. But the orders themselves of the Commission are not prima facie evidence as to the question of liability in a judicial proceeding." (Pages 728-9)

The court cites the cases of Pennsylvania R. Co. v. International Coal Mining Company and the case of Parsons v. Railway, supra, in support of its decision and held that the plaintiffs could not recover.

The Circuit Court of Appeals again had this question under consideration in the case of Lehigh Valley R. Co. v. Meeker, 211 Fed. 785. In the proceeding before the Interstate Commerce Com-

mission the rates under consideration were alleged to be unreasonable and discriminatory and reparation was awarded upon the basis of the rates found to be reasonable and non-discriminatory. In the court below the plaintiff introduced in evidence the report and the order of the Commission and a supplemental report and order and, aside from the testimony of one witness as to the discrimination alleged to have been practiced by defendant, no other showing was made.

It was contended that the reports and orders of the Commission made out a prima facie case in favor of plaintiff but the Circuit Court of Appeals rejected that view of the law and, distinguishing between reparation and administrative orders, reached the conclusion that:

> "The finding by the Commission that a given rate is unreasonable, while pertinent to the issue, in that it establishes a violation of the act, is not decisive of the question of liability for damages under section 8, in such a case as the present, either prima facie or otherwise.
>
> The pertinency and evidential weight and value of the facts, as to which the findings and order are prima facie evidence, are for the determination of the court and jury, as in other civil cases. They may or may not make out a prima facie case for the plaintiff."

The court below, in its charge to the jury, stated that the report and findings of the Commission finding the rates unreasonable and discriminatory and

awarding damages was prima facie evidence of defendant's liability and conclusive upon him unless he offered testimony in rebuttal. In holding this construction of the statute erroneous the court said:

> "In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in "in all respects like other civil suits for damages." The statute says that such facts as are stated in the findings or order of the Commission need not be proved in the suit for damages, but that such findings or order shall be prima facie evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order prima facie evidence of certain facts, but it does not make, or attempt to make, such facts prima facie evidence of anything."

Plaintiff contended, as here, that the measure of damages was the difference between the unreasonable rate paid and the rate found by the Commission to be reasonable and that upon proof of the amount paid and what the reasonable charge should have been, he was entitled, as a matter of law, to recover the difference between the two rates. After quoting from the opinion of the Supreme Court in the International Coal Mining Company, supra, the court goes on to say:

> "This statement of the Supreme Court is general, and is applicable to any and all cases

where damages are sought by one claiming to have been injured by a violation of the act. It would seem to dispose of the contention of the defendants in error, referred to above and approved by the court below, that 'the shipper was entitled as matter of law to recover the difference between the two rates,' that is, the tariff rate charged to the shipper, and the lower rate found to be reasonable by the Commission. Herein is the essential vice of defendant in error's argument, that the fact and amount of pecuniary loss in a case like the present, is *matter of law*, and *not of fact* to be determined by the jury. It does not help the matter that the defendants in error argue that the rate charged having been conclusively found by the Commission as unreasonable, the award of the difference between that rate and the rate found to be reasonable is only prima facie evidence of the liability of defendant for the amount so awarded. The act makes nothing prima facie evidence of the liability created by section 8. The prima facies mentioned in section 16 is attached to the *facts* stated in the finding and order of the Commission, which facts may or may not be sufficient to establish that liability.

* * * * * * *

If the intent of the legislative mind had been to go further and make, not only the findings of fact and order prima facie evidence of the facts stated, but also the conclusions of the Commission *on* facts, prima facie evidence of the *liability* of the defendant for the amount of damages stated in the award, such intent

should and would have found expression in the act. We are not to impute to Congress such an intention so violative of the fundamental rights of the parties to a suit at common law, and of the express guaranty of the Constitution in that regard. If more were wanted, we might refer to the language of section 14, which emphasizes the distinction between the 'conclusions' of the Commission and 'the findings of fact on which the award is made.'

The distinction between reparation and non-reparation cases, so anxiously made by Congress, in order to conform to the spirit of the seventh amendment, would be practically nullified, if, in prosecuting a suit for damages actually sustained by reason of a violation of the law, the liability for such damages, and the amount thereof, as found by the Commission, must be conceded in the first instance. Is a defendant to be called upon, practically to prove a negative, and show that the plaintiff was not damaged, or that the amount claimed was less than that stated by the Commission? These facts, or the facts upon which they depend, are all peculiarly within the knowledge of the plaintiff, and it is fundamental that neither party to a suit should be required to prove or disprove what is peculiarly within the knowledge of the opposite party."

It was pointed out that if plaintiff's theory were correct a suit of this nature is brought not to recover the damages he may have sustained but in reality it is instituted to collect a penalty as in such a case the Commission's findings would be con-

clusive upon the defendant. This theory was held untenable and because of the errors committed by the lower court the judgment was reversed and a venire de novo awarded.

As has been pointed out, the decisions are uniform in sustaining these legal principles. They have found favor with the Supreme Court of the United States in its recent decisions. They have been applied by the Circuit Court of Appeals in the Lehigh Valley case to facts identical with the facts in the case at bar and it must be held that these decisions place a proper construction upon the Interstate Commerce Act, in fact, the only construction which can be placed upon the act, and that therefore the learned trial judge erred in overruling the demurrer and in holding that plaintiffs had made a case by reliance upon the recitals contained in the Commission's decision and order.

It is respectfully submitted that the judgment should be reversed.

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